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IN THE

# Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

*Petitioner,*

v.

THE STATE OF OREGON

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

## BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER MOISES SANCHEZ-LLAMAS

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## INTEREST OF *AMICUS CURIAE*[1]

By signing and ratifying the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, the Government of Mexico and the Government of the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States pledged that detained Mexican nationals would be promptly informed of their right to consular notification, and that Mexico would be permitted to provide consular protection to those nationals. In turn, Mexico promised to extend those same rights to the United States and its nationals detained in Mexico. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States agreed that irreconcilable disputes over the interpretation and application of the treaty's provisions would be resolved by the International Court of Justice ("ICJ"). Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325.

Despite the clear obligations set forth in Article 36, United States authorities have repeatedly failed to advise detained Mexican nationals of their rights to consular notification and access. And over the last several years, Mexico has repeatedly sought to obtain legal remedies for those violations. Mexico has engaged in diplomatic negotiations with the United States, filed numerous amicus

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[1] Counsel for all parties have filed letters with the Court consenting to the filing of all *amici*. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the Government of Mexico, has made a monetary contribution to the preparation of this brief.

briefs in state and federal courts, and obtained an advisory opinion from the Inter-American Court on Human Rights, all to no avail. Finally, on January 9, 2003, Mexico exercised its right to initiate proceedings before the ICJ under the Optional Protocol to the Vienna Convention. On March 31, 2004, after reviewing the parties' extensive written and oral submissions, the ICJ issued its final judgment in *Avena and Other Mexican Nationals*.

Mexico has a direct interest in full compliance with the *Avena* Judgment and with the obligations set forth in the text of Article 36. The very purpose of Article 36 is to permit the nations that signed the Vienna Convention – including Mexico, the United States, and many other countries – to protect the interests of their citizens when they are arrested or otherwise detained while living, working, or traveling abroad. That interest is most acute when a citizen is facing trial in another country for a crime that may lead to severe sanctions, such as lengthy imprisonment or death.

## SUMMARY OF ARGUMENT

Mexico and the United States share a common interest in protecting the rights of their nationals abroad. In the last sixty years they have signed no fewer than three instruments cementing their commitment to consular notification and access.

Mexican law has long required consular officers to assist and advise detained nationals in their dealings with local authorities. To that end, Mexico has developed the most extensive consular network of any foreign nation in the United States. Consular officers act as cultural interpreters for Mexican nationals who are frightened by authority and isolated from their family and friends. The vast majority of

detained Mexican nationals are indigent, having immigrated to the United States from impoverished, rural communities. On average, they have no more than a sixth-grade education. For these detained nationals, the rights conferred by Article 36 of the Vienna Convention are no mere technicality.

Prompt compliance with the provisions of Article 36 is required by its text. Indeed, the United States has insisted on *immediate* compliance with Article 36 in addressing the situation of United States citizens detained in Mexico. On this, both Mexico and the United States agree: prompt consular access is essential to safeguard the rights of their detained nationals at a time when they are most vulnerable. Nevertheless, local authorities in the United States often fail to carry out their obligations under Article 36, preventing Mexican consular officers from carrying out their functions and depriving Mexican nationals of consular assistance during their detention and prosecution for serious criminal offenses.

In 2003, when it became clear that Mexico and the United States could not agree on the appropriate remedy for breaches of Article 36, Mexico exercised its right to submit the dispute to the ICJ for binding resolution. In doing so, Mexico sought – and obtained – a binding determination of the remedies that must be applied in *all* cases of its nationals who are subject to prolonged incarceration or severe penalties and who were not advised of their Article 36 rights.

The ICJ's final judgment in *Avena and Other Mexican Nationals* provides the framework under which Mr. Sanchez-Llamas's legal claims must be reviewed. The *Avena* judgment reaffirmed in the clearest possible terms that Article 36 of the Vienna Convention confers individual

rights on all Mexican nationals who are detained or arrested in the United States. The ICJ also determined that Mexican nationals subject to severe penalties or prolonged incarceration are entitled to meaningful judicial review by courts that are empowered to craft appropriate legal remedies for Article 36 violations.

In accordance with the terms of the *Avena* judgment, Mr. Sanchez-Llamas is entitled to judicial review and reconsideration of his conviction and sentence that gives full weight to the violation and its effects. But the lower courts abrogated their responsibility to conduct this review by concluding, first, that Mr. Sanchez-Llamas had no justiciable rights under Article 36, and second, that he was not entitled to the remedy of suppression. Each of these determinations is inconsistent with the final judgment of the ICJ, and cannot be upheld.

## ARGUMENT

### I. Mexico and the United States Have Repeatedly Pledged to Enforce the Rights of Consular Notification and Access.

Ever since Mexico and the United States established diplomatic relations, the two countries have been actively involved in the protection of their nationals within the other's territory. *See generally* Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner, *Medellín v. Dretke,* 125 S. Ct. 2088 (2005) at 4-10. In 1942, the two countries signed a bilateral consular convention that codified the customary rights of consular officers to assist their nationals. Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.- Mex., art. VI, 57 Stat. 800

("Bilateral Consular Convention"). Among other things, the Bilateral Consular Convention grants consular officers the right to visit detained nationals, to assist them "in proceedings before or relations with authorities of the State," and to "address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise." Bilateral Consular Convention, art. VI(2). The Bilateral Consular Convention likewise confers rights on detained nationals, who "shall have the right at all times to communicate with the consular officers of their country." *Id.*, art. VI(3).

The 1963 Vienna Convention on Consular Relations reaffirmed the rights set forth in the bilateral convention and elaborated on the types of services consular officers could provide. For example, article 5 of the Vienna Convention states, *inter alia*, that "[c]onsular functions consist in . . . helping and assisting nationals . . . [and] representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." Vienna Convention, arts. 5(e), 5(i). Article 36(1)(c) reinforces these provisions, expressly stating that consular officers may "arrange for [the] legal representation" of detained nationals. *Id.*, art. 36(1)(c).

Significantly, the Optional Protocol to the Vienna Convention gave states parties an additional avenue for dispute resolution that was unavailable under the bilateral consular convention. The United States was the leading proponent of this instrument,[2] which provides:

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[2] *See Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, U.N. Conference on Consular Relations, at

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

In 1996, the United States and Mexico reaffirmed their commitment to safeguard the consular rights of detained nationals and to implement both Article VI of the Bilateral Consular Convention and Article 36 of the Vienna Convention by providing

> settings conducive to full and free exchange between the consular representatives and detained individuals in order to allow, consistent with the relevant laws of each country, consular officials to interview their respective nationals when they are detained, arrested, incarcerated or held in custody in accordance with Article VI, paragraph 2, section (c) of the Consular Convention between the United Mexican States and the United States of America of August 12, 1942, and in accordance with Article 36, first paragraph, of the Vienna Convention on Consular Relations of 1963.

Memorandum of Understanding on Consular Protection of Mexican and United States Nationals, May 7, 1996, U.S.–Mex., paras. 2, 3, Dept. of State File No. P96 0065-0984/0987.

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249, U.N. Doc. A/CONF.25/16 (1963).

Within the framework of these instruments, both nations have developed comprehensive programs of consular assistance to their nationals abroad.

## II. Mexican Consular Officers Enhance the Truth-Seeking Function of the Courts by Ensuring Their Nationals Are Full Participants in Criminal Proceedings.

Courts in the United States frequently misapprehend the nature of consular assistance. As a result, they often undervalue the services provided by consular officers in evaluating the harm caused by Article 36 violations. In Mexico's experience, however, consular assistance not only improves the quality of the defense, but also affects the critical choices made by its nationals facing serious criminal charges.

Detained foreign nationals "are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991) (quoting U.S. Dep't. of State, Telegram 40298 to Embassy Damascus, Feb. 21, 1975). As a jurist on the Inter-American Court of Human Rights has observed,

> consular protection "does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable. . . . Foreigners under detention, in a social and juridical *milieu* and in an idiom different from their own and that they do not know sufficiently, experiment often a condition of particular vulnerability, which the right to information on consular assistance. . . seeks to remedy.

OC-16/99, Inter-Am. Ct. H.R. ¶ 23 (October 1, 1999) (Trinidade, J., concurring).

Mexican consular officers assist their detained nationals in the United States in overcoming these unique disadvantages. Mexican law expressly requires consuls "to assist and advise Mexicans in their dealings with local authorities." LEE, *supra,* at 127 (quoting *Ley Orgánica del Servicio Exterior Mexicano y su Reglamento*, Art. 88). Consequently, each of Mexico's forty-six consulates is staffed by consular officers trained to provide immediate and far-reaching assistance to Mexican nationals facing serious criminal charges. *See Valdez v. State* 46 P.3d 703, 710 (Okla. Crim. App. 2002) ("It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing").

Mexico's commitment to the protection of its nationals stems in part from its conviction, born of experience, that most Mexican nationals are poorly equipped to navigate the legal system of a foreign country. *See* Memorial of Mexico (*Mex. v. U.S.*), 2003 I.C.J. Pleadings (*Avena and Other Mexican Nationals*) A39, App. 7 (June 20, 2003) (Declaration of Roberto Rodríguez Hernández). Most Mexican nationals who immigrate to the United States speak little English, have no more than a primary school education, and come from impoverished communities.[3] Mexican

[3] Mr. Sanchez Llamas fits the typical profile of a Mexican immigrant. He grew up in a rural area of Mexico bordering the states of Guanajuato and Jalisco, and began working at the age of fourteen. Tr. (Motion to Suppress) vol. 1 at 196, 227. At the age of twenty-one, he immigrated

consular officers have observed that even nationals who have resided in the United States for many years retain a strong connection with Mexican culture. Some never learn to speak English fluently. They face problems assimilating to a foreign culture in which they are not fully accepted. As one commentator has observed,

> Mexican immigrants come to the United States to face grossly incorrect perceptions, negative stereotypes, both malignant and benign prejudices, hostility, and antipathy.

J. Palerm, B.R. Vincent, and K. Vincent, *Mexican Immigrants in Courts, in* IMMIGRANTS IN COURTS 96 (Joanne Moore, ed., 1999). *See also* Leo R. Chavez, SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY 20-22 (2d ed. 1998).

Significant cultural and linguistic barriers impede the ability of Mexican nationals to communicate effectively with their attorneys and to participate fully in their defense. *See* Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding,* 19 W. NEW ENG. L. REV. 193, 194-96 (1997). They have trouble grasping abstract legal concepts such as the right to remain silent and their right to have an attorney

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illegally to the United States, where he was a migrant worker in Florida and California. *Id.* at 227. As is typical of many Mexican migrants, he periodically returned to Mexico before re-entering the United States to work. *Id.* at 230. At the time of his arrest, he spoke little English, even though he had sporadically worked as a migrant laborer in the United States for approximately eleven years. *Id.* at 124, 143, 227.

present during the interrogation[4] – even after they are advised of their *Miranda* rights by the police. In part, this may be attributable to the substantial differences between the U.S. and Mexican criminal justice systems.

Under Mexican criminal law, statements given to the police during an interrogation are deemed to have no evidentiary value.[5] A defendant's statement is admissible evidence only if the statement was taken down before the prosecutor ("Ministerio Público") or judge and in the presence of counsel or "person of confidence" to the defendant.[6] Even if a defendant's statement has been taken in accordance with Mexican law, it cannot serve as the sole basis for his prosecution. CÓDIGO FEDERAL DE PROCEDIMIENTOS PENALES, art. 287. Consequently, Mexican nationals in the United States are sometimes surprised when their incriminating statements to the police become the centerpiece of the prosecution's case.

There is no such thing as "plea bargaining" in Mexico. Moreover, crimes are punished differently in

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[4] Even if a detained Mexican national comprehends his right to have a lawyer present during an interrogation, he may find it difficult to convey an "unambiguous request" for counsel as required by *Davis v. United States*, 512 U.S. 452, 459 (1994). As the Court itself has recognized, this rule disadvantages defendants with a lack of linguistic skills. 512 U.S. at 460. *See also* Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 32-33 (1999).

[5] CÓDIGO FEDERAL DE PROCEDIMIENTOS PENALES (Mexican Federal Code of Criminal Procedure), art. 287.

[6] *See* CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, (Political Constitution of the United Mexican Status), Title I, Ch. I, art. 20 (A)(II).

Mexico than they are in the United States. Particularly if they have had no prior contact with the United States's criminal justice system, Mexican nationals often fail to appreciate the gravity of the charges they are facing. Mexico's consular officers are therefore trained to advise Mexican nationals regarding the critical differences between the two countries' criminal justice systems. *See Ledezma v. State*, 626 NW.2d 134, 152 (Iowa 2001) (timely contact with Mexican consular officials "can eliminate false understandings and prevent actions which may result in prejudice to the defendant" since consular officers can explain the "significant differences between the American and Mexican criminal justice systems"); *State v. Ramirez*, 732 N.E.2d 1065, 1070-71 (Ohio App. 1999) (compliance with Article 36 obligations would have ensured that *Miranda* violation "would have been avoided" because "the American legal system would have been explained to appellant who, as a Mexican national, had not been exposed to nuances of our justice system the way that most Americans are"); *United States v. Rangel-Gonzales*, 617 F.2d 529, 532-33 (9th Cir. 1980) (even if Mexican Consulate "would have done nothing more than advise appellant of his right to counsel . . . it remains difficult from a practical standpoint to equate being advised by the [arresting authority] in an adversary setting with being advised by the Mexican Consulate.").

Upon learning that a Mexican national has been detained and charged with a serious crime, Mexico's consistent consular practice is to contact the national as soon as possible in order to explain his legal rights in a familiar language, and ensure that he truly understands the scope and significance of those rights within the United States legal system. Detainees are advised not to discuss their case or to sign any documents without consulting with an attorney.

These are not superfluous advisements: consular protection officers have reported many cases in which Mexican nationals have signed confessions written in English without understanding what they were signing. *See, e.g.*, David Heinzmann and Jeff Coen, *Jailed by Lies, Freed by Truth,* CHICAGO TRIBUNE, Dec. 22, 2002, at 1 (describing the case of Omar Aguirre, a Mexican national who was exonerated five years after he signed a written confession in English to a crime he did not commit). Police officers who speak little to no Spanish frequently conduct interrogations, leading to miscommunication and often unreliable statements. Jeff Coen, *With Cops as Interpreters, Suspects at Risk*, CHICAGO TRIBUNE, Aug. 14, 2003, at 1; Beth Musgrave, *Cities to Hire Full-Time Interpreters,* LEXINGTON HERALD-LEADER, Oct. 2, 2004, at B1 (describing botched interpretation of *Miranda* rights to defendant who was later acquitted).

In the case of a Mexican national who faces severe punishment, consular officers provide other crucial services as well.[7] Among other things, they can ensure the defendant receives qualified and effective legal counsel. Many assigned lawyers do not speak Spanish and rarely enjoy access to Spanish-speaking investigators and experts. Even when the national speaks English fluently, his family usually does not. Thus, counsel's inability to speak Spanish presents a substantial impediment to obtaining evidence from relatives and other key witnesses.

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[7] The extraordinary services that Mexican consular officers provide to nationals facing the death penalty are a matter of public record, and are described at length in Mexico's submissions to the ICJ. *See* Memorial of Mexico (*Mex. v. U.S.*) at 11-38; *Torres v. State,* 120 P.3d 1184 (Okla. Crim. App. 2005), 2005 Okla. Crim. App. LEXIS 12 at *8 (noting that the protection of Mexican nationals facing capital proceedings is one of the highest priorities of Mexican consular representatives).

Consular officers are therefore instructed to support the defense by acting as a "cultural bridge" between the defendant and his lawyer, communicating with the defendant's family members, friends and others who may be able to offer assistance or information vital to the defense, and tracking down records and other documents located in Mexico. *See Torres*, 2005 Okla. Crim. App. LEXIS at *8 ("Had the consulate been contacted, it would have monitored Torres's case, consulted with and offered assistance to his attorney, and helped gather evidence, particularly in preparation for the second stage of trial."). If consular officers conclude that the defense attorney is not able to provide high-quality representation, they attempt to secure more effective legal counsel, a function that is entirely consistent with the rights of consular officers under Article 36(c) of the Vienna Convention.

## III. Prompt Compliance with Article 36 Is Essential to Protect the Rights of Detained Nationals at the Time When They Are Most Vulnerable.

By its plain terms, Article 36 requires the competent authorities to notify detained nationals of their consular rights "without delay." Vienna Convention, Art. 36(1)(b). As interpreted by the ICJ in its *Avena* Judgment, this phrase gives rise to an obligation to advise a detained foreign national of his Article 36 rights "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31), ¶ 88 ("*Avena*").

Mexico and the United States have long recognized

that prompt consular access is critical to safeguard the rights of their nationals at a time when they are most vulnerable. For example, indigent Mexican nationals in the United States often spend days or even weeks in detention before they are appointed counsel.[8] During this time, they are confused and isolated. Mexican nationals who do not speak English have trouble communicating their most basic needs. Consular assistance is crucial to ensure that they understand their legal rights and the seriousness of the charges, to monitor their mental and physical health, and to put them in touch with their families. As noted above, Mexican consular officers are trained to contact detained nationals at the earliest possible opportunity to carry out these functions. In addition, consulates will sometimes retain legal counsel at this initial stage of the prosecution in order to provide legal advice to Mexican nationals facing serious charges.

The United States has been equally assiduous in seeking prompt access to detained U.S. citizens abroad. Indeed, U.S. consular officers are instructed to "make every effort to gain prompt personal access to an arrested U.S. citizen or national" in order, *inter alia*, to have "the opportunity to explain the legal and judicial procedures of

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[8] Benito Albarran Ocampo, an indigent Mexican national charged in 2005 with capital murder in Huntsville, Alabama, was without counsel for ten weeks. Mexico eventually retained counsel to represent him. In another case of a Mexican national charged with capital murder in Blair County, Pennsylvania, the court failed to appoint counsel for six weeks after the defendant's arrest in connection with a highly publicized triple homicide. After Mexico filed a motion objecting to the failure to appoint counsel, the court eventually assigned the office of the public defender to represent the accused. *See Commonwealth v. Padilla*, No. 2005 MD 1855 (Blair Co. Ct. Common Pleas Oct. 14, 2005) (order appointing counsel).

the host government and the detainee's rights under that government at a time when such information is most useful." U.S. Department of State, *Foreign Affairs Manual* (2004), § 7 Consular Affairs, 7 FAM 422 *Access*, at (f). These consular functions are critical, since

> [l]egal systems vary greatly, particularly outside common law areas. Arrested U.S. citizens or nationals often have an imperfect understanding of American criminal procedure and less or no understanding of the legal procedures of the country in which they are detained.

*Id.* 7 FAM 415.3 *Develop Judicial Materials*. The State Department has accordingly emphasized that one of the "fundamental responsibilities" of U.S. consulates is "helping Americans who are incarcerated; *advising them of their legal rights when they're incarcerated*, when their [sic] imprisoned in foreign countries; helping to get them legal assistance."[9]

Prompt access also ensures that consular officers "can provide the arrestee with a list of reputable lawyers or information concerning local legal aid before the arrestee selects a lawyer." *Id.* 7 FAM 422, *Access*, at (e). United States consular officers are therefore instructed to arrange a consular visit "within 24 hours," and if that is not possible, to "contact the detainee by telephone . . . [and] ask the detaining authorities to permit a private conversation." *Id.* 7 FAM 422.1-2 *Telephone Contact*.

In 1975, complaints by United States citizens incarcerated in Mexico led to congressional hearings. At

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[9] R. Nicholas Burns, Spokesperson, U.S. Department of State, Daily Press Briefing (Sept. 29, 1995) (emphasis added), *available at* http://www.hri.org/docs/statedep/1995/95-09-29.std.html.

those hearings, State Department representatives testified that in order to fully protect the rights of prisoners and prevent abuses, *immediate* consular access was critical:

> A particular issue of prime importance is that of denied or delayed consular access. We believe that *immediate* consular access is the linchpin on which hangs in large measure the solution to many of our problems. With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.

*U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs*, Part II, 94th Cong. 6 (1975) (Statement of Leonard F. Walentynowicz) (emphasis added) [hereinafter "Congressional Hearings on U.S. Citizens in Mexico"].

Clearly, the United States views timely consular intervention as an indispensable tool to protect the rights of United States citizens detained abroad. Mexico merely seeks the same rigorous compliance with Article 36 in this country as the United States insists upon abroad.

## IV. The Avena Judgment Has Binding Force in the Case of Mr. Sanchez-Llamas.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by

both the United States and Mexico. U.N. Charter, *opened for signature* Jun. 26, 1945, 59 Stat. 1031, T.S. No. 993. By ratifying Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94, para. 1. And by ratifying Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the International Court of Justice, art. 59, 59 Stat. 1055, T.S. 993.

### A. The ICJ's Judgment Applies to All Mexican Nationals Facing Severe Penalties or Prolonged Incarceration.

The Government of Mexico had four objectives when it initiated proceedings against the United States at the ICJ.[10] First, Mexico sought the Court's review of over fifty cases of Mexican nationals sentenced to death in the United States, all of whom had been deprived of their rights to consular notification. It did so not out of any sense that remedies for Article 36 violations are confined to capital cases but rather, in the words of the current ICJ President, because such violations are of "particular significance in a case where a sentence of death is imposed, which is not only a punishment

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[10] *See Application Instituting Proceedings (Mex. v. U.S.)*, I.C.J. General List No. 128 (9 January 2003) ("Application"). All of the documents from the *Avena* proceedings cited herein are available on the website of the International Court of Justice, *at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

of a severe nature, but also one of an irreversible nature."[11]

Second, Mexico initiated proceedings in order to resolve its dispute with the United States over the interpretation and application of Article 36, including the precise meaning of the obligation of the detaining authority to provide consular information and notification "without delay." Third, Mexico sought "to establish definitively its rights and those of its nationals under Article 36 of the Vienna Convention, as authoritatively interpreted by this Court in *LaGrand*." Application, *supra*, at ¶ 5. And finally, Mexico requested that the ICJ "adjudge and declare" that the United States must comply with its Article 36 obligations in "any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row and any other Mexican national in its territory." *Avena* ¶¶ 12(5), 13(4). In other words, Mexico sought – and obtained – a binding determination of the remedies that must be applied in *all* cases of its nationals whose Article 36 rights were violated in the United States and who were "convicted and sentenced to severe penalties." *Id.* ¶¶ 18-19.

The United States's responses to Mexico's claims reflect its understanding that the ICJ's judgment would extend to other Mexican nationals apart from those on death row. In its first oral presentation to the *Avena* Court, the United States acknowledged that "under *LaGrand*, in cases of violations of Article 36 and the imposition of *severe sentences, including the death penalty*, the remedy is review

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[11] *LaGrand* (*F.R.G. v. U.S*), 2001 I.C.J. 466 (June 27) ("*LaGrand*"), Separate opinion of Vice-President Shi, at para. 17, http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_toc.htm.

and reconsideration of the conviction and sentence in light of the violation."[12] In its written submissions, the United States correctly noted that Mexico's request for remedies "would have the Court require the United States to take specific acts in its municipal criminal justice systems with respect to the cases of fifty-four alleged Mexican nationals and other unnamed Mexican nationals"[13] and that it is "the criminal law and processes of these fifty [U.S.] states, then, that would ultimately have to accommodate any ruling by this Court."[14]

The ICJ's final judgment reflects the parties' consensus on this point. While the ICJ's assessment of the scope of the asserted Article 36 violations was necessarily confined to the facts of the individual cases under review, its determination of the remedies required to cure all such violations was expressed in universal terms:

> To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention . . . .

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[12] *Case Concerning Avena and Other Mexican Nationals*, Verbatim Record of 21 January 2003, at 3.9 (Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Department of State) (emphasis added).

[13] 1 Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (*Avena and Other Mexican Nationals*) 40 (Nov. 3, 2003).

[14] *Id.* at 214.

> In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

*Avena* ¶ 151.

To eliminate any doubt that the Court's Judgment would apply to future cases of Mexican nationals sentenced to "severe penalties," the Court unanimously declared that:

> should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention . . . .

*Id.* ¶ 153(11). The *Avena* Judgment does not define what constitutes a "severe penalty" that would trigger the right to judicial review and reconsideration. However, the Court's own language and actions establish that this remedy must be applied to a varied set of circumstances, one that includes but is surely not confined to death sentences. For example, the death sentences of three of the named individuals were commuted during the course of the *Avena* litigation, yet the ICJ nevertheless ordered an identical review and reconsideration of their convictions and sentences.[15]

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[15] *Avena* ¶ 106 (1) (referring to the cases of Juan Caballero, Mario Flores, and Gabriel Solache); 106 (3) (referring to the cases of Juan Caballero and Mario Flores); 153(9) (ordering review and

In light of the express terms of the ICJ's Judgment, there can be no doubt that the judicial remedy mandated by the *Avena* Court applies to the case of Mr. Sanchez Llamas, who has been sentenced to serve more than twenty years in prison.[16]

### B. The ICJ Has Determined That Article 36 Confers Individual, Justiciable Rights on Detained Foreign Nationals

In both *LaGrand* and *Avena*, the ICJ confirmed that Article 36 confers individual, justiciable rights on detained foreign nationals. In *LaGrand,* after analyzing the scope and purpose of Article 36, and the repeated references to individual rights in its text, the Court held that "the clarity of these provisions, viewed in their context, admits of no doubt."[17] And in *Avena,* the ICJ reaffirmed that "the

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reconsideration of those cases). As a result of the commutation orders, two of these nationals received life sentences, but one received a sentence of forty years. Anne Sweeney, *Sentences of 3 Cut to 40 Years*, CHICAGO SUN-TIMES (Jan. 12, 2003), at 6.

[16] Under the penal codes of some parties to the VCCR, a prison term of more than 20 years would equal or exceed the maximum sentence applied in law or practice. *See, e.g.*, General Civil Penal Code of Norway (amended 1 July 1994), § 17 (b) (imprisonment may only be imposed "for a term not exceeding 21 years"); Richard Bernstein, *Germany Frees Hijacker Who Killed U.S. Sailor,* N.Y. TIMES, Dec. 21, 2005, at A12 (noting that in 1989, maximum sentence for murder allowable under German law was 25 years).

[17] *LaGrand* (*F.R.G. v. U.S*), 2001 I.C.J. 466 (June 27), ¶ 77 (finding that Article 36 confers rights on individual foreign detainees, as well as on their home governments).

individual rights of Mexican nationals under subparagraph 1 *(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States." *Avena* ¶ 40.

While the ICJ's construction of Article 36 is both authoritative and legally binding, it is by no means the only proof that the treaty provision confers privately enforceable rights. Sixty-three parties to the VCCR have endorsed the ICJ's interpretation in briefs submitted to this Court,[18] and the United Nations General Assembly has repeatedly affirmed the importance of the individual consular rights conferred under Article 36 as a due process safeguard.[19]

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[18] See Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005), (statement by forty- nine European nations that Article 36 confers legally-enforceable rights on individuals); Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner Jose Ernesto Medellin, 125 S. Ct. 2088 (2005) (statement by thirteen Latin American nations, not including Mexico, that U.S. courts should furnish remedies for Article 36 violations). In a case pre-dating *LaGrand* and *Avena*, the Government of Canada likewise supported the view that individuals had judicially enforceable rights under Article 36(2). *See* Brief Amicus Curiae of the Government of Canada in Support of Petition for Writ of Certiorari, *Faulder v. Johnson* (No. 98-7001) (1998) at 1, 4 (arguing that "dismissal of Mr. Faulder's Vienna Convention claim on local procedural grounds violates the express provisions of article 36(2)").

[19] Resolutions recognizing individual consular rights within the framework of due process guarantees have been endorsed by consensus in every session of the U.N. General Assembly since 2000. *See, e.g.*, *Protection of Migrants*, G.A. Res. 54/166, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/166 (2000); G.A. Res. 55/92, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/92 (2001); G.A. Res. 56/170, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/170 (2002); G.A. Res. 571218, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/218 (2003), *all available at* http://www.un.org/Depts/dhl/resguide/gares1.htm. On 18 March 2005,

Similarly, the United States has repeatedly contended that its nationals have individual or inherent rights to consular access. At congressional hearings held in 1975 regarding United States citizens incarcerated in Mexico, a State Department official testified that "[a]ll of us regard consular protection as an *inherent right of every citizen.*" Congressional Hearings on U.S. Citizens in Mexico, Part I, at 16 (emphasis added). Later in those same hearings, a State Department official emphasized the need to actively intervene in individual cases to protect those individual rights:

> [W]e are persuaded that to make progress in protecting *the rights of U.S. citizens in Mexico*, we must repeatedly present Mexican authorities with the facts, demonstrate how they constitute a violation of Mexican and/or international law and norms, and insist that such violations be corrected and prevented in the future.

*Id.* at 63 (emphasis added). And in a case brought before the ICJ on behalf of United States nationals held hostage in the American Embassy in Tehran, the United States argued that Article 36 "*establishes rights . . . for the nationals of the sending State* who are assured access to consular officers and through them to others." *See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* 1980 I.C.J. Pleadings at 174 (emphasis added).

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the General Assembly took note of the *Avena* Judgment and recalled "the obligations of States reaffirmed therein" in its annual resolution on the protection of migrants. *See* G.A. 59/194, U.N. GAOR, 59th Sess., U.N. Doc. A/RES/59/194 < http://www.un.org/Depts/dhl/resguide/r59.htm>.

In recent years, in response to litigation by detained foreign nationals, the State Department has adopted a different interpretation of Article 36. Mexico respectfully suggests that the current view of the State Department is at odds with the plain text of the treaty and, in any event, is no longer sustainable in light of *Avena*.

### C. When Article 36 Violations Are Raised in Pretrial Proceedings, Suppression Should Be an Available Remedy.

The ICJ first confronted the question of remedies for Article 36 violations in its *LaGrand* Judgment, where it addressed the application of the procedural default rule in the cases of two German nationals executed by the state of Arizona. While noting that the procedural default rule itself did not violate the Vienna Convention, the Court concluded that its application in the cases of the LaGrand brothers had effectively prevented United States courts "from attaching any legal significance" to the violation of Article 36(1). *LaGrand* ¶ 91. While the courts had addressed the LaGrands' legal claims "by reference to United States constitutional standards," that review was insufficient to satisfy the United States's obligations under Article 36(2). *Id.*

The ICJ also addressed the question of reparation in response to Germany's request for effective remedies in future capital murder prosecutions of German nationals whose Article 36 rights were violated. The United States had consistently argued that no legal remedies would be required in such cases, and that the only reparation available for breaches of the Vienna Convention was a diplomatic

apology. *See id.* ¶ 123. The ICJ, however, held that if the United States "should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice" in cases involving prolonged detention or severe penalties. *Id.* ¶ 125. In such cases, the Court held, the United States would be required to allow "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *Id.*

One of the central disputes between the parties in *Avena* involved the interpretation of *LaGrand*'s requirement of "review and reconsideration." The United States contended that "review and reconsideration" could be conducted by clemency authorities. *Avena* ¶ 136. Mexico, by contrast, argued that "review and reconsideration" should be conducted by the judiciary, in proceedings that were both transparent and subject to judicial oversight. *Id.* ¶ 135. In addition, Mexico requested "that the convictions and sentences of the 52 Mexican nationals be annulled, and that, in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded." *Id.* ¶ 117.

In response to the parties' submissions, the ICJ determined that review and reconsideration should be conducted by the United States courts. *Id.* ¶¶ 127, 140-41. In addition, the Court established guidelines for that review. First, review and reconsideration must be of both the conviction and sentence. *Id.* ¶ 153(9). Second, the review must be "effective" and must "guarantee that the violation and the possible prejudice caused by that violation be *fully examined and taken into account* in the review and reconsideration process. *Id.* ¶ 138 (emphasis added). And

finally, the courts cannot tether their review of a Vienna Convention violation to the United States Constitution. *Id.* ¶ 139. In other words, the courts cannot reject an Article 36 claim by concluding that the defendant received his due process rights under United States law. Rather, the courts must give full and independent weight to the Article 36 violation and its consequences in each case to ascertain whether the violation "caused actual prejudice to the defendant in the process of the administration of criminal justice." *Id.* ¶¶ 121, 139.

Because the legal consequences of the treaty violation depend on the facts of each case, the ICJ did not accept Mexico's request for automatic annulment of the fifty-two nationals' convictions and death sentences. At the same time, the Court recognized that such remedies could be the ultimate result of the review and reconsideration process in some cases. *Id.* ¶ 123 ("It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides *the necessary and sole remedy*.") (emphasis added). Similarly, the Court found it unnecessary to examine Mexico's contention that the exclusionary rule was a "general principle of law" under the Court's Statute. Observing that the exclusionary rule "relates to the question of what legal consequences flow" from the breach of Article 36 obligations, the Court concluded that the United States courts should examine the appropriateness of suppression "under the concrete circumstances of each case . . . in the process of their review and reconsideration." *Id.* ¶ 127.

If there is one clear principle that emerges from the *Avena* Judgment, it is this: whenever Mexican nationals have been deprived of their consular rights in the United States and are "subjected to prolonged detention or convicted and sentenced to severe penalties, *the legal consequences of*

*this breach have to be examined and taken into account*" by the United States courts. *Id.* ¶ 140 (emphasis added). This review must take place regardless of the point at which the Vienna Convention violation is eventually discovered. It would make no sense at all to conclude from the ICJ's judgment that Article 36 violations can only be raised on appeal or in post-conviction proceedings – a point with which the United States apparently agrees.

In letters addressed to the Ambassador of Mexico to the United States, the Justice Department has repeatedly declared that, "[c]onsistent with the opinion of the International Court of Justice" in *Avena*, a detained Mexican national is

> free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated by a failure to inform him of his right to contact his consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national and to argue that prejudice resulted from the alleged Vienna Convention violation.

Letter of John Ashcroft, Attorney General for the United States of America, to His Excellency Carlos de Icaza, Ambassador of Mexico to the United States, June 3, 2004.[20]

Of course, it would make no sense to advise Mexico that its nationals are "free to raise" Article 36 violations in

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[20] *See also* Letter of John C. Richter, Acting Attorney General for the United States of America, to His Excellency Carlos de Icaza, Ambassador of Mexico to the United States, July 28, 2005. Both letters are attached in the Appendix.

pre-trial proceedings if the courts are precluded from providing any legal remedies for those violations. *Cf. Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) ("The provisions of the Convention should be implemented before trial when they can be appropriately addressed."). Moreover, a *per se* rule precluding courts from suppressing evidence as a remedy for Vienna Convention violations would violate both the letter and the spirit of the *Avena* Judgment. If courts are prevented from crafting appropriate remedies for Article 36 violations in pre-trial proceedings, they will be unable to attach "legal consequences" to the breach of the Convention. Such a blanket prohibition would therefore violate the United States's obligations under Article 36(2) in precisely the same manner as the application of the procedural default rule did in *LaGrand*.

The ICJ clearly contemplated – and the United States agrees – that as a result of *Avena*, some Mexican nationals could receive new trials or new sentencing proceedings. *See Brief for the United States as Amicus Curiae Supporting Respondent, Medellín v. Dretke*, 125 S.Ct. 2088 (2005) (No. 04-5928), at 47 (in the event that prejudice is found upon review and reconsideration, "a new trial or a new sentencing would be ordered."). It would defy logic to conclude that, while an appellate court has the power to order a new trial to remedy a Vienna Convention violation, it may not suppress evidence under any circumstances.[21] The United States

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[21] Several scholars have also advocated for suppression of statements taken in violation of Article 36. *See, e.g.*, Valerie Epps, "Violations of the Vienna Convention on Consular Relations: Time for Remedies," 11 WILLAMETTE J. INT'L L. & DISPUTE RES. 1 (2004); Frederic L. Kirgis, "Restitution as a Remedy in U.S. Courts for Violations of International Law," 95 AM. J. INT'L L. 341 (2001).

courts should be free to apply a wide range of remedies for Vienna Convention violations – whether those violations are raised pre-trial, on direct appeal, or in post-conviction proceedings. The remedies will vary in each case, depending on the court's evaluation of the harm caused by the violation.

Finally, in their evaluation of harm, the courts should be guided by the principles articulated by the Permanent Court of International Justice in its seminal *Chorzów Factory* decision,[22] which was cited with approval by the *Avena* Court:

> What constitutes "reparation in an adequate form" clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury . . . "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

*Avena* ¶ 119. Moreover, the courts should be instructed that when assessing Vienna Convention claims presented in pre-trial proceedings, they should refrain from assuming that merely because the defendant was advised of his *Miranda* warnings, he cannot establish harm. Such a facile analysis would run afoul of *Avena,* since it fails to accord full weight to the Article 36 violation on its own terms. Moreover, this view fails to take account of the nature of consular assistance described in Part II, *supra*. *See Rangel-Gonzales*, 617 F.2d at 532-33 (advice provided by Mexican Consulate cannot be

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[22] *Factory at Chorzów,* Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.

equated with administration of *Miranda* warnings by police officer).

The State of Oregon does not dispute that its authorities failed to comply with Article 36 in the case of Mr. Sanchez-Llamas. Nevertheless, the Oregon Supreme Court has failed to provide him with the review and reconsideration mandated by the ICJ, and has determined that it will *never* provide a judicial remedy for an Article 36 violation raised in pre-trial proceedings.[23] That determination violates the United States's international legal obligations under both Article 36(2) and the *Avena* Judgment, and should be rejected by this Court.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Oregon should be reversed.

Respectfully submitted,

Sandra L. Babcock
Counsel for *Amicus Curiae*
1516 W. Lake Street, Suite 400
Minneapolis, MN 55408
612) 871-5080

Dated: Minneapolis, MN
December 22, 2005

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[23] Mexico recognizes that the opinion of the Oregon Supreme Court addressed only the remedy of suppression of incriminating statements. There is no question, however, that under this opinion no Oregon court could provide a pre-trial judicial remedy to a Mexican national who demonstrated that his Article 36 rights had been violated.

Office of the Attorney General
Washington, D.C. 20530

June 3, 2004

His Excellency
Carlos de Icaza
Ambassador of Mexico
1911 Pennsylvania Avenue, NW
Washington, DC 20006

Dear Ambassador Icaza:

Thank you for your letter of March 10, 2004, in which you advised of Mexico's opposition to the death penalty generally and requested that the United States not seek the death penalty in the case of Mexican national Alejandrino Guerrero, who is awaiting federal prosecution in North Dakota for his alleged role as the leader of a drug distribution network.

The decision whether to seek the death penalty in every death penalty eligible federal case is made in accordance with the provisions of the United States Attorneys' Manual, chapter 9-10, a copy of which is attached. Although the decision ultimately is mine, as Attorney General, it is made only after extensive review by the United States Attorney for the charging district, in this case the District of North Dakota, and the Attorney General's Review Committee on Capital Cases at the Department of Justice. Defense counsel for a defendant facing potential capital charges is given the opportunity to present

relevant facts and mitigating evidence to the prosecuting United States Attorney and, if the United States Attorney intends to recommend seeking the death penalty, defense counsel will be afforded an opportunity to present the reasons against seeking the death penalty to the Attorney General's Review Committee on Capital Cases. In making my decision, I have before me all materials submitted as part of the Department of Justice's review process, as well as the recommendations of the United States Attorney and the Review Committee.

The case of Alejandrino Guerrero was submitted in January 2004 to the Department of Justice for consideration by the Review Committee. On April 23, 2004, at the conclusion of the review process, my decision was not to seek the death penalty in Alejandrino Guerrero's case.

You have also expressed your concern that Mr. Guerrero was not informed of his opportunity to consult with consular officials in accordance with the Vienna Convention on Consular Relations. Mr. Guerrero's defense counsel has been instructed to inform Mr. Guerrero of his right to consult with the Mexican consular officials, in the event that Mr. Guerrero was not previously so informed. In addition, Mr. Guerrero's case has not yet proceeded to trial. Consistent with the opinion of the International Court of Justice in *Mexico v. United States of America* (Case Concerning Avena and other Mexican Nationals), Mr. Guerrero is free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated by a failure to inform him of his right to contact his consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national and to argue that prejudice resulted from the alleged

Vienna Convention violation.

Sincerely,

John Ashcroft
Attorney General

Enclosure

**U.S. Department of Justice**
Criminal Division
Washington, D.C. 20530
Acting Assistant Attorney General

July 28, 2005

His Excellency Carlos de Icaza
Ambassador
Embajada de Mexico
1911 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Ambassador Icaza:

We received your letter dated February 15, 2005, informing the Attorney General of Mexico's opposition to the death penalty generally and requesting that the United States not seek the death penalty in the case of Mexican national Ivan Mendoza-Rico, who is awaiting federal prosecution in Idaho for his alleged role in a drug trafficking-related murder on September 27, 2004.

The decision whether to seek the death penalty in every death penalty-eligible federal case is made in accordance with the provisions of the United States Attorneys' Manual, chapter 9-10, a copy of which is attached. Although the decision ultimately is the Attorney General's, it is made only after extensive review by the United States Attorney for the charging district, in this case the District of Idaho, and the Attorney General's Review Committee on Capital Cases at the

Department of Justice. Defense counsel for a defendant facing potential capital charges is given the opportunity to present relevant facts and mitigating evidence to the prosecuting United States Attorney and, if the United States Attorney intends to recommend seeking the death penalty, defense counsel will be afforded an opportunity to present the reasons against seeking the death penalty to the Attorney General's Review Committee on Capital Cases. In making his decision, the Attorney General has before him all materials submitted as part of the Department of Justice review process, as well as the recommendations of the United States Attorney and the Review Committee. The case of Ivan Mendoza Rico was submitted in January 2005 to the Department of Justice for consideration by the Review Committee. No decision on that case has been announced.

The standards for determining whether or not the government should seek the death penalty are set forth in the United States Attorneys' Manual as follows:

> In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General may consider any legitimate law enforcement or prosecutorial reason that weighs for or against seeking the death penalty.
>
> In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee, and the Attorney General must determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently

outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. To qualify for consideration in this analysis, an aggravating factor must be provable by admissible evidence beyond a reasonable doubt. Because there may be little or no evidence of mitigating factors available for consideration at the time of this determination, any mitigating factor reasonably raised by the evidence should be deemed established and weighed against the provable aggravating factors. The analysis employed in weighing the aggravating and mitigating actors that are found to exist should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Weak aggravating or mitigating factors may be accorded little or no weight. Finally, there must be substantial admissible and reliable evidence of the aggravating factors.

The authorization process is designed to promote consistency and fairness. As is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty.

USAM 9-10.080. While Mexico's sentiment against the death

penalty is not directly relevant to these established standards, defense counsel for the defendant is free to argue that it provides a basis for exempting him from the death penalty.

The protocol procedures were established to promote consistency and fairness in the federal death penalty authorization process. The protocol reflects a concern that, in all instances, this most serious decision be made on the facts and merits of the case, including relevant aggravating and mitigating evidence, and that the decision to seek the death penalty not be founded on the vagaries of where the crime occurred, local sentiment for or against the death penalty, or any other factor that undermines the goal of consistency and fairness. Because the death penalty-eligible charges against this defendant have been brought before the Department for review, which remains pending, I cannot comment further on the matter.

You have also expressed your concern that Mr. Mendoza-Rico was not informed of his opportunity to consult with consular officials in accordance with the Vienna Convention on Consular Relations. I have been informed by the U.S. Attorney for the District of Idaho that on October 1, 2004, Brian Nyland of the Department of Homeland Security informed the defendant of his right to consult with consular officials. In addition, Mr. Mendoza-Rico's case has not yet proceeded to trial. Consistent with the opinion of the International Court of Justice in *Mexico v. United States of America (Case Concerning Avena and other Mexican Nationals)*, Mr. Mendoza-Rico is free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated by a failure to inform him of his right to contact his

consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national and to argue that prejudice resulted from the alleged Vienna Convention violation.

Sincerely,

John C. Richter
Acting Assistant Attorney General

Enclosure